



**A. Animal Manures Such As Poultry Litter Are Not “Solid Waste” Within The Meaning Of RCRA When They Are Used As Fertilizer Or Soil Conditioner**

RCRA was enacted to address the growing volume of garbage in America. Specifically, RCRA’s citizen suit provision applies to anyone who has “contributed to” the “handling, storage, treatment, transportation, or disposal of any *solid waste*.” 42 U.S.C. § 6972(a)(1)(B) (emphasis added). “Solid waste” is in turn defined in RCRA to mean:

any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations. . . .

42 U.S.C. § 6903(27). Thus, RCRA “solid waste” comprises four clearly delineated categories: “garbage;” “refuse;” “sludge” from a water or air pollution control facility; or other “discarded material.” As Plaintiffs point out, the statutory definition includes the words “solid . . . material resulting from . . . agricultural operations,” Plaintiffs’ Reply to Defendants’ Memorandum in Opposition (“Reply”) at 2, but Plaintiffs gloss over the fact that such materials are included only as a subset of the category “discarded material.” RCRA plainly does not reach *all* “material resulting from . . . agricultural operations,” but only those that are “garbage,” “waste,” or “discarded.”

RCRA’s legislative history draws this same distinction and is clear that not all materials from agricultural operations are covered by RCRA. To the contrary, Congress intended to exclude completely manures such as poultry litter when they are applied to the soil because in doing so they are not discarded but rather are beneficially reused:

Waste itself is a misleading word in the context of the committee's activity. Much industrial and agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses. . . . *Agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation.*

H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. at 2, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240 (emphasis added). Reliable legislative history such as this strongly informs the statutory meaning. *INS v. Cardozo-Fonseca*, 480 U.S. 421, 432 & n.12 (1987) (legislative history confirms the plain import of the statute). Congress' statement clearly indicates a complete exclusion for manures that are returned to the soils as either a fertilizer or soil conditioner. The question under 42 U.S.C. § 6903(27) is whether such animal manures are "discarded material." Congress has categorically said that they are not.

Even without this categorical indication that manures are not "discarded" when used as a fertilizer or soil amendment, such manures still fall outside the statutory definition of solid waste because they are neither garbage, refuse, or sludge, nor are they otherwise discarded. Given its ordinary meaning, the term "discarded" means "disposed of," "thrown away," or "abandoned." *American Mining Congress v. EPA*, 824 F.2d 1177, 1179 (D.C. Cir. 1987); *Zands v. Nelson*, 779 F. Supp. 1254, 1261-62 (S.D. Cal. 1991). The term connotes a lack of value in the marketplace, an absence of benefit in the material's use, and an intent to be rid of the material in question. Courts have looked to these factors—market value, beneficial use, and intent to throw away—as guideposts in determining whether materials are "discarded" within the meaning of RCRA. For example, material that has leaked from a storage tank into the soil is no longer a "useful product." *Zands*, 824 F. Supp. at 1262; *Craig Lyle Ltd. Partnership v. Land O'Lakes*, 877 F. Supp. 476 (D. Minn. 1995). Conversely, pesticide sprayed with the intention to kill pests is not "discarded," despite being spread across the landscape, *No Spray Coalition v. City of New York*, 2000 WL 1401458, at \*3 (S.D.N.Y. Sept. 25, 2000), and a bullet fired from a gun is not "discarded" because the shooter "is putting the lead bullet to its intended use." *Simsbury-Avon Preservation Society, LLC v. Metacon Gun Club*, 2005 U.S. Dist. LEXIS 11699 at \*6, 2005 WL

1413138 (D. Conn. June 14, 2005). Manure used as fertilizer or soil conditioner is used for its intended and beneficial purpose, and is used in lieu of more expensive commercial fertilizers. Such manures are thus not “discarded,” and therefore cannot be RCRA “solid waste.”

**B. EPA Has Repeatedly Excluded From RCRA “Solid Waste” Animal Manure Applied To The Soil As Either Fertilizer Or Soil Amendment**

Following Congress’ clear direction, EPA has repeatedly excluded animal manures applied to the soil as fertilizer or soil conditioner from RCRA’s definition of “solid waste.” Because Congress entrusted EPA with the responsibility to administer RCRA, the Court should defer to EPA’s judgment. *See, e.g., United States v. Power Engineering Co.*, 303 F.3d 1232, 1236-38 (10th Cir. 2002) (deferring to EPA’s reasonable interpretation of RCRA under *Chevron*); *Maier v. EPA*, 114 F.3d 1032, 1043 (10th Cir. 1997) (extending *Chevron* deference to EPA’s interpretation of the Clean Water Act).

RCRA requires solid wastes to be disposed of in “sanitary landfills” that are regulated under the Act and prohibits open dumping of solid waste. 42 U.S.C. §§ 9643(a)(2)(B); 9644(b); 9645(a). Unsurprisingly then, one of EPA’s first steps to implement RCRA was to propose a rule distinguishing RCRA-authorized “sanitary landfills” from “open dumps.” 42 U.S.C. § 6944(a); 42 Fed. Reg. 31116 (July 5, 1977). This rulemaking turned on the application of the statutory definition of “solid waste,” and thus provides EPA’s interpretation of that term. EPA’s proposed rule expressly excluded “agricultural wastes, including manures[,] returned to the soil as fertilizers or soil conditioners.” 43 Fed. Reg. 4942, 4943 (Feb. 6, 1978). Thus, a field to which animal manure was applied as fertilizer does not become an illegal “open dump” under RCRA because the material is not a statutory solid waste. To support this exclusion EPA specifically cited the Congress’s view that “[a]gricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials.” *Id.*

EPA re-emphasized this point when it adopted the proposed rule. The final rule (which is in the Code of Federal Regulations today) expressly provides that the criteria used to determine what qualifies as “open dumps” “do not apply to agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners.” 40 C.F.R. § 257.1(c)(1). *See also* 44 Fed. Reg. 53438, 53440 (Sept. 13, 1979) (final rules).<sup>1</sup>

This was not the only time that EPA issued a rule recognizing that animal manures returned to the soil as fertilizer or soil amendment are excluded from RCRA’s definition of solid waste. For example, in 1991 EPA defined a type of facility where solid wastes could be processed on the ground. But EPA made clear that this “[l]and application unit” for solid waste “means an area where wastes are applied onto or incorporated into the soil surface (*excluding manure spreading operations*) for agricultural purposes or for treatment and disposal.” 40 C.F.R. § 257.2. Thus, the language in the statutory definition of solid waste that Plaintiffs point to—“solid ... material resulting from ... agricultural operations”—is not a nullity, since EPA has confirmed that *some* agricultural landspreading may result in a “land application unit” subject to RCRA regulation, just not landspreading of manure.

EPA’s subsequent conduct confirms its continuing view that animal manures applied to the land as fertilizer or soil conditioner are not RCRA solid waste. In 1981 EPA, promulgated a guidance manual to help states properly classify solid waste facilities. The procedures “detailed in this manual [were] specifically designed for the evaluation of existing solid waste disposal facilities.” EPA, *Classifying Solid Waste Disposal Facilities: A Guidance Manual* 4 (Jan. 1981)

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<sup>1</sup> EPA also issued an environmental impact statement (EIS) in support of its final rule classifying “sanitary landfills” and “open dumps.” The EIS catalogued the costs associated with RCRA’s regulation of solid waste, but made no mention of any costs associated with disposal of animal manure, which would be significant. EPA, *Environmental Impact Statement: Criteria for Classification of Solid Waste Disposal Facilities and Practices* (Dec. 1979) (excerpted at Exhibit 3).

(excerpted at Exhibit 2). The manual was intended for use in “evaluations of . . . waste landspreading facilities, including those accepting sludges or wastes from . . . agricultural operations.” *Id.* Again, however, EPA expressly excluded “facilities where agricultural wastes (e.g., manure and crop residues) are returned to the soil as fertilizer or soil conditioners.” *Id.* at 5. Then, from 1981 to 1985, EPA proceeded to identify all open dumps in the country but did not list a single poultry litter land application site. *See, e.g.,* EPA, *Inventory of Open Dumps* (May 1983) (excerpted at Exhibit 4).

In 1984, Congress amended and reauthorized RCRA. Congress is presumed to be aware of agency interpretations, and when it re-authorizes a statute without changing the relevant provision, courts presume that Congress “adopt[ed] that interpretation.” *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). The 1984 bill did nothing to amend RCRA’s definition of solid waste (on the books since 1978), or the manner in which EPA had applied that definition to exclude animal manures in the materials described above. Accordingly, EPA continued its longstanding rules excluding animal manures from RCRA regulation.

In 1988 EPA issued a report to Congress on the state of solid waste disposal in the United States. EPA noted that 2 billion tons of wet manure are produced annually by livestock in the United States. In keeping with its longstanding interpretation, EPA also observed that manures returned to the soil is not covered by RCRA. EPA, *Report to Congress: Solid Waste Disposal in the United States* Vol. II, 3-31 (Oct. 1988) (attached as Exhibit 5)

EPA has thus held to the view that animal manure land applied as a fertilizer or soil conditioner is not a solid waste under RCRA. Contrary to the Plaintiffs’ assertions, fields where poultry litter has been applied do not become “open dumps” and animal manure need not be trucked to a “sanitary landfill,” as would be the case if poultry litter were a solid waste. Because

it is used as valuable and beneficial fertilizer or soil conditioner, poultry litter is not a “solid waste” covered by RCRA.

**C. Whether A Material May Cause Pollution Is Irrelevant To Whether It Is “Solid Waste”**

Notably, the fact that a material may or may not cause pollution is irrelevant to whether it is “solid waste” under RCRA. If a product is not discarded but is rather used as it is intended, it is not solid waste even if it pollutes. *See Otay Land Co. v. U.E. Ltd., L.P.*, 440 F. Supp. 2d 1152, 1180 (S.D. Cal. 2006); *Long Island Soundkeepers Fund, Inc. v. New York Athletic Club*, 1996 WL 131863, at \*8 (S.D.N.Y. Mar. 22, 1996). This is why commercial fertilizer applied to homeowners’ lawns is not a “solid waste,” even if some of its constituents run off in stormwater. Similarly, burning grass residue for the fertilizer value of the ash does not create “solid waste,” even though the burning creates smoke and other airborne particulate matter. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1043-45 (9th Cir. 2004). Various other laws regulate materials on the basis of whether they cause air or water pollution, but not RCRA. *See, e.g.*, *Williams Aff* ¶¶ 51-55.

Thus, even if the Court were to conclude that Congress did not categorically exclude animal manures from RCRA’s definition of “solid waste,” the factual question for the Court to resolve during the hearing is not whether poultry litter contributes constituent elements to the environment, but rather whether Plaintiffs have proved that individuals using poultry litter in the IRW are simply throwing it away, rather than treating it as a commodity with economic value and beneficial uses.

**D. Contrary To Plaintiffs’ Assertion, RCRA’s “Hazardous Waste” Regulations Do Not Define Solid Waste For Purposes of RCRA**

EPA has issued two separate and distinct regulatory systems under RCRA. Subtitle C of EPA’s RCRA regulations addresses “hazardous waste.” Subtitle D of the regulations addresses

“solid waste.” In this case, Plaintiffs assert that poultry litter is a “solid waste” Subtitle D, but do not assert that it qualifies as a RCRA “hazardous waste” under Subtitle C.<sup>2</sup> *See, e.g.*, Motion for Preliminary Injunction, Dkt. # 1373, at 12; Daily Transcript T. 1055:11-15.

Nevertheless, in their Reply, Plaintiffs selectively cited a provision of RCRA’s subtitle C (hazardous waste) regulations in an attempt to convince the Court that animal manures can be considered a solid waste under Subtitle D. Reply at 2. This argument is highly misleading. Plaintiffs cited 40 C.F.R. § 261.4(b), which provides in relevant part:

(b) . . . . The following solid wastes are not hazardous wastes: \* \* \*

(2) Solid wastes generated by any of the following and which are returned to the soils as fertilizers: \* \* \*

(ii) The raising of animals, including animal manures.

Read in isolation, 40 C.F.R. § 261.4(b) could be read to state that animal manures returned to the soil as fertilizer, while not hazardous waste, could be solid waste. This is the reading Plaintiffs urge on this Court. Reply at 2. But EPA has expressly prohibited such mixing of its hazardous waste and solid waste definitions.

In fact, EPA has specifically warned litigants and the courts that the argument Plaintiffs now advance is incorrect. When EPA set out to regulate hazardous wastes under RCRA, the agency deliberately made its hazardous waste regulations more broadly applicable than the RCRA solid waste regulations. *See* 44 Fed. Reg. 14472, 14502 n.66 (Apr. 4, 1983). Accordingly, for purposes of the hazardous waste regulations (Subtitle C) *and for purposes of those regulations alone*, EPA provided a broader definition of “solid waste.” *See id.* That is why 40 C.F.R. § 261.1, which Plaintiffs failed to mention, states unambiguously that:

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<sup>2</sup> Plaintiffs likely did not assert that poultry litter is “hazardous waste” under RCRA because such an allegation would require Plaintiffs to show poultry litter has certain harmful attributes, which it does not. *See* 42 U.S.C. § 6903(5).



The definition of solid waste contained in this part *applies only to wastes that are also hazardous for purposes of the regulations implementing subtitle C of RCRA*. For example, it does not apply to materials (such as non-hazardous scrap, paper, textiles, or rubber) that are not otherwise recycled.

40 C.F.R. § 261.1(b)(1) (emphasis added). Thus, the definition Plaintiffs' cite is irrelevant to the solid waste question presently before the Court.

**E. The Complaint Filed In Support Of The EPA in *United States v. Seaboard Farms, LP* is Not Inconsistent With EPA's View That Land-Applied Manure Is Not A RCRA Solid Waste**

Plaintiffs' reply brief also noted a complaint filed by the federal government in *United States v. Seaboard Farms, LP*, No. 5:06-cv-00990-HE (W.D. Okla. Sept. 14, 2006), which alleged that swine effluent was RCRA "solid waste." This single unadjudicated complaint, Plaintiffs argue, proves that "EPA views animal manure as a solid waste under RCRA." Reply at 2-3 n.3.

*Seaboard Farms* does not apply here for two reasons. *First*, EPA's underlying order in the case addressed only materials that were leaking from hog effluent lagoons into the subsurface and thus were obviously not being applied to the soil as fertilizer or soil conditioner. Accordingly, the exclusion that Defendants rely upon in this case was inapplicable.

The *Seaboard Farms* complaint charged only a single count, enforcement of an EPA Administrative Order ("AO") (attached as Exhibit 6), which had been issued previously to several swine facilities. *Seaboard Farms* Complaint at 9 (attached as Exhibit 7). That AO, in turn, was intended to "identify, investigate, and prevent the mishandling . . . of any solid waste" on the targeted swine facilities. AO ¶ 7. The AO did not allege that land-applied hog manure was a solid waste, but instead limited its scope as follows: "Swine effluent [sic] leaked into ground water in various ways, such as from a lagoon or associated infrastructure (piping) is a discarded material from agriculture operations and thus a solid waste." AO ¶ 33. The focus of

the parties' discussions preceding issuance of the AO was the "alleged ground water impacts from leaking lagoons." AO ¶ 60.<sup>3</sup> In view of its concern with leaking effluent lagoons, EPA ordered the defendants to conduct remedial studies and develop a work plan to remedy the contamination. AO ¶¶ 74-106. Leaked effluent is not land applied manure, and the AO made no demand with regard to land application.

*Second*, the *Seaboard Farms* complaint addressed "swine effluent," which the case documents recognized were different from animal manure. Swine effluent comprises many possible constituents beyond manure. As the Complaint makes clear, hog farms wash not only pig manure and urine into lagoons, but also wastewater from various aspects of the farm's operations. Complaint ¶ 16. These might include cleaning chemicals such as disinfectants, veterinary products, and other farm wastes. The *Seaboard Farms* complaint thus does not prove any departure by EPA from its consistent view that poultry litter that is land applied as a fertilizer or soil conditioner is not RCRA solid waste.

### CONCLUSION

RCRA on its face limits its definition of "solid waste" to "discarded materials." Congress has expressly stated that animal manures used as fertilizers or soil conditioners are not "discarded materials." EPA has consistently followed Congress's direction. Neither RCRA's hazardous waste regulations nor the *Seaboard Farms* complaint dictate otherwise. Moreover, even if animal manures returned to the soil had not been excluded from RCRA, poultry litter would still not be a solid waste because it is beneficially used rather than being discarded. Plaintiffs' request for a preliminary injunction must be denied and its RCRA claim dismissed.

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<sup>3</sup> In fact, the only substantive discussion of land application of swine effluent in the AO notes that a study of the effects of land application had not yet turned up any evidence of contamination. AO ¶57.H-I.

Respectfully submitted,

BY: /s/ Robert W. George

Robert W. George, OBA #18562  
Michael R. Bond  
KUTAK ROCK LLP  
The Three Sisters Building  
214 West Dickson Street  
Fayetteville, AR 72701-5221  
Telephone: (479) 973-4200  
Facsimile: (479) 973-0007

-and-

Thomas C. Green  
Mark D. Hopson  
Jay T. Jorgensen  
Timothy K. Webster  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005-1401  
Telephone: (202) 736-8000  
Facsimile: (202) 736-8711

-and-

Stephen L. Jantzen, OBA # 16247  
Patrick M. Ryan, OBA # 7864  
Paula M. Buchwald, OBA # 20464  
RYAN, WHALEY & COLDIRON, P.C.  
119 N. Robinson  
900 Robinson Renaissance  
Oklahoma City, OK 73102  
Telephone: (405) 239-6040  
Facsimile: (405) 239-6766

**ATTORNEYS FOR TYSON FOODS, INC.;  
TYSON POULTRY, INC.; TYSON  
CHICKEN, INC; AND COBB-VANTRESS,  
INC.**

BY: /s/ James M. Graves

(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)

James M. Graves

Gary V. Weeks  
BASSETT LAW FIRM  
P.O. Box 3618  
Fayetteville, AR 72702-3618  
Telephone: (479) 521-9996  
Facsimile: (479) 521-9600

-and-

Randall E. Rose, OBA #7753  
George W. Owens  
OWENS LAW FIRM, P.C.  
234 W. 13<sup>th</sup> Street  
Tulsa, OK 74119  
Telephone: (918) 587-0021  
Facsimile: (918) 587-6111  
**ATTORNEYS FOR GEORGE'S, INC. AND  
GEORGE'S FARMS, INC.**

BY: /s/ A. Scott McDaniel

(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)

A. Scott McDaniel, OBA #16460  
Nicole M. Longwell, OBA #18771  
Philip D. Hixon, OBA #19121  
MCDANIEL, HIXON, LONGWELL  
& ACORD  
320 South Boston Ave., Ste. 700  
Tulsa, OK 74103  
Telephone: (918) 382-9200  
Facsimile: (918) 382-9282

-and-

Sherry P. Bartley  
MITCHELL, WILLIAMS, SELIG,  
GATES & WOODYARD, PLLC  
425 W. Capitol Avenue, Suite 1800  
Little Rock, AR 72201  
Telephone: (501) 688-8800  
Facsimile: (501) 688-8807  
**ATTORNEYS FOR PETERSON  
FARMS, INC.**

BY: /s/ R. Thomas Lay

(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)

R. Thomas Lay, OBA #5297  
KERR, IRVINE, RHODES & ABLES  
201 Robert S. Kerr Ave., Suite 600  
Oklahoma City, OK 73102  
Telephone: (405) 272-9221  
Facsimile: (405) 236-3121

-and-

Jennifer s. Griffin  
LATHROP & GAGE, L.C.  
314 East High Street  
Jefferson City, MO 65101  
Telephone: (573) 893-4336  
Facsimile: (573) 893-5398  
**ATTORNEYS FOR WILLOW BROOK  
FOODS, INC.**

BY: /s/ John R. Elrod

(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)

John R. Elrod  
Vicki Bronson, OBA #20574  
P. Joshua Wisley  
CONNER & WINTERS, L.L.P.  
211 East Dickson Street  
Fayetteville, AR 72701  
Telephone: (479) 582-5711  
Facsimile: (479) 587-1426

-and-

Bruce W. Freeman  
CONNER & WINTERS, L.L.P.  
1 Williams Center, Room 4000  
Tulsa, OK 74172  
Telephone: (918) 586-5711  
Facsimile: (918) 586-8547  
**ATTORNEYS FOR SIMMONS FOODS,  
INC.**

BY: /s/ Robert P. Redemann

(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)

Robert P. Redemann, OBA #7454  
Lawrence W. Zeringue, OBA #9996  
David C. Senger, OBA #18830  
PERRINE, MCGIVERN, REDEMANN,  
REID, BERRY & TAYLOR, P.L.L.C.  
Post Office Box 1710  
Tulsa, OK 74101-1710  
Telephone: (918) 382-1400  
Facsimile: (918) 382-1499

-and-

Robert E. Sanders  
Stephen Williams  
YOUNG WILLIAMS P.A.  
Post Office Box 23059  
Jackson, MS 39225-3059  
Telephone: (601) 948-6100  
Facsimile: (601) 355-6136

**ATTORNEYS FOR CAL-MAINE FARMS,  
INC. AND CAL-MAINE FOODS, INC.**

BY: /s/ John H. Tucker

(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)

John H. Tucker, OBA #9110  
Theresa Noble Hill, OBA #19119  
RHODES, HIERONYMUS, JONES, TUCKER &  
GABLE, PLLC  
100 W. Fifth Street, Suite 400 (74103-4287)  
P.O. Box 21100  
Tulsa, Oklahoma 74121-1100  
Telephone: 918/582-1173  
Facsimile: 918/592-3390

-and-

Delmar R. Ehrich  
Bruce Jones  
Dara D. Mann  
Krisann C. Kleibacker Lee  
FAEGRE & BENSON LLP

2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402

Telephone: 612/766-7000

Facsimile: 612/766-1600

**ATTORNEYS FOR CARGILL, INC. AND  
CARGILL TURKEY PRODUCTION, LLC**

### CERTIFICATE OF SERVICE

I certify that on the 11th day of March 2008, I electronically transmitted the attached document to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Tina L. Izadi, Assistant Attorney General	tina_izadi@oag.state.ok.us
Daniel Lennington, Assistant Attorney General	daniel.lennington@oak.ok.gov

Douglas Allen Wilson	doug_wilson@riggsabney.com,
Melvin David Riggs	driggs@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
David P. Page	dpage@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis	

Robert Allen Nance	rnance@riggsabney.com
Dorothy Sharon Gentry	sgentry@riggsabney.com
Riggs Abney	

J. Randall Miller	rmiller@mkblaw.net
-------------------	--------------------

Louis W. Bullock	lbullock@bullock-blakemore.com
------------------	--------------------------------

Michael G. Rousseau	mrousseau@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
Motley Rice LLC	

Elizabeth C. Ward	lward@motleyrice.com
Frederick C. Baker	fbaker@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Motley Rice	

#### **COUNSEL FOR PLAINTIFFS**

Stephen L. Jantzen	sjantzen@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Ryan, Whaley & Coldiron, P.C.	

Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com
Sidley Austin LLP	
Robert W. George	robert.george@kutakrock.com



Michael R. Bond  
Erin Walker Thompson  
Kutak Rock LLP

michael.bond@kutakrock.com  
erin.thompson@kutakrock.com

**COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.;  
AND COBB-VANTRESS, INC.**

R. Thomas Lay  
Kerr, Irvine, Rhodes & Ables

rtl@kiralaw.com

Jennifer S. Griffin  
Lathrop & Gage, L.C.

jgriffin@lathropgage.com

**COUNSEL FOR WILLOW BROOK FOODS, INC.**

Robert P. Redemann  
Lawrence W. Zeringue  
David C. Senger

rredemann@pmrlaw.net  
lzingue@pmrlaw.net  
dsenger@pmrlaw.net

Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

Robert E. Sanders  
E. Stephen Williams  
Young Williams P.A.

rsanders@youngwilliams.com  
steve.williams@youngwilliams.com

**COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.**

George W. Owens  
Randall E. Rose  
The Owens Law Firm, P.C.

gwo@owenslawfirmmpc.com  
rer@owenslawfirmmpc.com

James M. Graves  
Gary V. Weeks  
Paul E. Thompson, Jr.  
Woody Bassett  
Jennifer E. Lloyd  
Bassett Law Firm

jgraves@bassettlawfirm.com  
pthompson@bassettlawfirm.com  
wbassett@bassettlawfirm.com  
jlloyd@bassettlawfirm.com

**COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.**

John R. Elrod  
Vicki Bronson  
P. Joshua Wisley  
Conner & Winters, P.C.

jelrod@cwlaw.com  
vbronson@cwlaw.com  
jwisley@cwlaw.com

Bruce W. Freeman  
D. Richard Funk  
Conner & Winters, LLLP

bfreeman@cwlaw.com

**COUNSEL FOR SIMMONS FOODS, INC.**

John H. Tucker  
Leslie J. Southerland  
Colin H. Tucker  
Theresa Noble Hill  
Rhodes, Hieronymus, Jones, Tucker & Gable

jtucker@rhodesokla.com  
ljsoutherland@rhodesokla.com  
chtucker@rhodesokla.com  
thill@rhodesokla.com

Terry W. West  
The West Law Firm

terry@thewesetlawfirm.com

Delmar R. Ehrich  
Bruce Jones  
Krisann Kleibacker Lee  
Dara D. Mann  
Todd P. Walker  
Faegre & Benson LLP

dehrich@faegre.com  
bjones@faegre.com  
kklee@baegre.com  
dmann@faegre.com  
twalker@faegre.com

**COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC**

Michael D. Graves  
D. Kenyon Williams, Jr.  
**COUNSEL FOR POULTRY GROWERS**

mgraves@hallestill.com  
kwilliams@hallestill.com

William B. Federman  
Jennifer F. Sherrill  
Federman & Sherwood

wfederman@aol.com  
jfs@federmanlaw.com

Charles Moulton  
Jim DePriest  
Office of the Attorney General

charles.moulton@arkansag.gov  
jim.depriest@arkansasag.gov

**COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION**

Carrie Griffith  
**COUNSEL FOR RAYMOND C. AND SHANNON ANDERSON**

griffithlawoffice@yahoo.com

Gary S. Chilton  
Holladay, Chilton & Degiusti, PLLC

gchilton@hcdattorneys.com

Victor E. Schwartz  
Cary Silverman  
Shook, Hardy & Bacon, LLP

vschwartz@shb.com  
csilverman@shb.com

Robin S. Conrad  
National Chamber Litigation Center, Inc.

rconrad@uschamber.com

**COUNSEL FOR AMICI CURIAE CHAMBER OF COMMERCE FOR THE U.S. AND THE AMERICAN TORT REFORM ASSOCIATION**

Richard C. Ford  
LeAnne Burnett  
Crowe & Dunlevy

fordr@crowedunlevy.com  
burnettl@crowedunlevy.com

**COUNSEL FOR AMICUS CURIAE OKLAHOMA FARM BUREAU, INC.**

M. Richard Mullins  
McAfee & Taft

richard.mullins@mcafeetaft.com

James D. Bradbury  
James D. Bradbury, PLLC

jim@bradburycounsel.com

**COUNSEL FOR AMICI CURIAE TEXAS FARM BUREAU, TEXAS CATTLE FEEDERS**

**ASSOCIATION, TEXAS PORK PRODUCERS ASSOCIATION AND TEXAS ASSOCIATION OF DAIRYMEN**

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

C. Miles Tolbert  
Secretary of the Environment  
State of Oklahoma  
3800 North Classen  
Oklahoma City, OK 73118  
**COUNSEL FOR PLAINTIFFS**

Thomas C. Green  
Sidley Austin Brown & Wood LLP  
1501 K Street NW  
Washington, DC 20005  
**COUNSEL FOR TYSON FOODS, INC.,  
TYSON POULTRY, INC., TYSON  
CHICKEN, INC.; AND COBB-VANTRESS,  
INC.**

Dustin McDaniel  
Justin Allen  
Office of the Attorney General of Arkansas  
323 Center Street, Suite 200  
Little Rock, AR 72201-2610  
**COUNSEL FOR THE STATE OF  
ARKANSAS AND THE ARKANSAS  
NATURAL RESOURCES COMMISSION**

/s/ Robert W. George